Office - Supreme Court, U.S.
FILED
NOV 19 1984
ALEXANDER STEVAS
CLERK

(2)

NO. 84-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

W. L. BALLARD,

Petitioner,

v.

PAUL BLOUNT, etc., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: 404-656-3389

JIM O. LLEWELLYN
Senior Assistant
Attorney General

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General

33pp

QUESTIONS PRESENTED

1. Is a college professor's criticism of the internal operating policies and affairs of his academic department (specifically, course content, teaching assignments and views on departmental needs for the teaching of freshman composition) "protected" speech under the First Amendment for purposes of securing federal judicial review of whether or not his merit pay raises were large enough?

2. Assuming *arguendo* that this Court were for any reason to: (1) view the instant case as not being controlled in Respondents' favor by *Connick v. Myers*, or (2) be disposed to overrule *Connick*, is the judgment below nonetheless correct and properly affirmable on the record based upon the following alternative grounds:

(a) Do facts of record demonstrate that even were the speech to be viewed as "protected", Respondents would still be entitled to judgment under each of the two tests enunciated by this Court in *Mt. Healthy*?

(b) Do facts of record demonstrate an absence of federal jurisdiction under the "case or controversy" limitations of Article III of our Constitution for want of any judicially ascertainable *injury in fact* to Petitioner.

(c) Does the fact that a faculty grievance committee considered and rejected Petitioner's pay raise claims, concluding that there had been no showing that his less than hoped for salary increases had been unfairly discriminatory or based upon anything other than his academic performance, render relitigation of these controlling evidentiary conclusions of the grievance com-

mittee inappropriate under *Board of Education of Rogers, Arkansas v. McCluskey*?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals are correctly identified in the caption of Petitioner's Petition for a Writ of Certiorari.

INDEX

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
(1) Nature of the Case and Proceedings Below	2
(2) Statement of Facts	3
SUMMARY OF ARGUMENT	9
ARGUMENT	11
1. The district court's decision in this case was arrived at through precisely that analysis of the content, form and context of Petitioner's "speech" which this Court called for in *Connick v. Myers*, 461 U.S. 138 (1983). Its conclusion that Petitioner's comments about the internal operating policies and academic affairs of his College and Department did not constitute "protected speech" for purposes of constitutionalizing and involving the federal judiciary in the size of Petitioner's pay raises was not only authorized, but was indeed compelled by *Connick*	11
(a) The decision below is plainly correct	11
(b) Petitioner's suggestion that the decision below involves a conflict between the circuits on the proper application of *Connick* is inaccurate	16

INDEX

Page

2. Even were the Court disposed to overrule or limit its decision in *Connick*, or, were it for any other reason to conclude that *Connick* was not controlling as to Dr. Ballard's case, the petition for certiorari should be denied in that the judgment of the district court, affirmed by the Court of Appeals, was in fact correct and affirmable on each of three alternative grounds.. 18

   (a) Facts of record show that should *Connick* be disregarded and Petitioner's speech held to be protected, the judgment below would still be correct and affirmable under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).... 19

   (b) Facts of record demonstrate an absence of federal jurisdiction under the "case or controversy" limitations of Article III of our Constitution—namely a want of any judicially ascertainable "injury in fact" to Petitioner..... 22

   (c) Relitigation of the controlling evidentiary conclusions of the faculty grievance committee would be inappropriate under *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966 (1982)..... 24

CONCLUSION..... 26

TABLE OF AUTHORITIES

Page

Cases

Ballard v. Blount, 581 F.Supp. 160 (N.D.Ga. 1983) 1, 2, 3, 12, 15

Bickford v. International Speedway Corporation, 654 F.2d 1028 (5th Cir. Unit B, 1981) 19

Bishop v. Wood, 426 U.S. 341 (1976) 12

Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966 (1982) ..... ii, iv, 11, 24, 25

Board of Regents v. Roth, 408 U.S. 564 (1972) 23

Bowman v. Pulaski County Special School District, 723 F.2d 640 (8th Cir. 1983) 17

Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972) 13

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

Cook v. Ashmore, 579 F.Supp. 78 (N.D.Ga. 1984) 17

Czurlanis v. Albanese, 721 F.2d 98 (3rd Cir. 1983) 17

Gitlow v. New York, 268 U.S. 652 (1925) 22

Gonzalez v. Benavides, 712 F.2d 142 (5th Cir. 1983) ... 17

Hughes v. Superior Court of California, 339 U.S. 460 (1950) 22

J. E. Riley Investment Co. v. Commissioner, 311 U.S. 55 (1940) 19

Jordan v. Board of Regents, University System of Georgia, 583 F.Supp. 23 (S.D.Ga. 1983), *aff'd.*, 727 F.2d 1114 (11th Cir. 1984) 17

Laird v. Tatum, 408 U.S. 1 (1972) 10, 23, 24

Landrum v. Eastern Kentucky University, 578 F.Supp. 241 (E.D.Ky. 1984) 17, 18

Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983) 20

Mahaffey v. Kansas Board of Regents, 562 F.Supp. 887 (D.Kan. 1983) 18

TABLE OF AUTHORITIES (Continued)

Page

Cases (Continued)

McGee v. South Pemiscot School District, 712 F.2d 339 (8th Cir. 1983) 16, 17

Morris v. Travisono, 707 F.2d 28 (1st Cir. 1983) 19

Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274 (1977) ..... i, 9, 19, 20, 22

National Student Association v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969) 23

Paul v. Davis, 424 U.S. 693 (1976) 23

Pickering v. Board of Education, 391 U.S. 563 (1968) 12, 13, 14

Rowe v. Forrester, 368 F.Supp. 1355 (M.D.Ala. 1974) 14

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 10, 23

Warth v. Seldin, 422 U.S. 490 (1975) 10, 23

Constitutional Provisions

U.S. Const., Art. III ..... i, iv, 10, 22, 23

U.S. Const., Amend. I ..... *passim*

U.S. Const., Amend. XIV 1, 3, 22

Statutes

28 U.S.C. § 1254 3

42 U.S.C. § 1983 ..... 1, 3, 12

Miscellaneous

Fed. R. App. P. 34(a) 1, 3

11th Cir. R. 23 ..... 1, 3

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia is reported as *Ballard v. Blount*, 581 F.Supp. 160 (N.D.Ga. 1983). On appeal the United States Court of Appeals for the Eleventh Circuit placed the case on its "Non-Argument Calendar" under Fed. R. App. P. 34(a) and 11th Cir. R. 23, and affirmed without opinion. *See Ballard v. Blount*, 734 F.2d 1480 (11th Cir. 1984).

JURISDICTION

The jurisdictional basis of Petitioner's application for review by this Honorable Court is correctly set forth in his Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

While Respondents agree as to the involvement of the First Amendment and 42 U.S.C. § 1983, both of which are accurately set forth at p. iv of the Petition for Certiorari, it is Respondents' view that since the First Amendment has no application to the States or State officials other than through Section 1 of the Fourteenth Amendment, this section of the Fourteenth Amendment is also pertinent. It provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The facts of record in this case are considerably more involved than would appear from Petitioner's "Statement of the Case". While Respondents do not take exception to the general accuracy of what Petitioner says, it is their view that a somewhat more comprehensive statement would be helpful to the Court in its consideration of whether or not the decision below is "cert-worthy".

(1) Nature of the Case and Proceedings Below.

This action is essentially an attack by a college professor of the English Department at Georgia State University (a member institution of the University System of Georgia) upon the size of certain of his annual merit salary increases, it being Petitioner's contention that his pay raises haven't been as large as they should have been. R. 5, 8-9, 134.[1] Following an adverse adjudication by a faculty grievance committee in the Spring of 1981 (R. 225-230), the professor, Dr. W. L. Ballard, filed the instant action in the United States District Court for the Northern District of Georgia on December 11, 1981. Dr. Ballard alleged that he had received "less than average salary increments for academic years 1976-77, 1977-78, 1978-79, 1980-81, and 1981-82" (R. 5), and sought federal

---

[1] The Complaint also alleged various lesser grievances as a contended denial of "committee assignments", denial of "summer teaching opportunities", denial of "released time", and the curtailment of course offerings in the area of Petitioner's specialty, namely "linguistics". R. 6. These contentions were not pressed, however, following undisputed evidence (including Petitioner's own admissions) that he had in fact served on committees and had summer teaching assignments, with the curtailment of course offerings in linguistics following long-term lack of student interest and enrollment. R. 213-218. The district court referred to the dubious nature of these claims in view of Petitioner's admissions. 581 F.Supp. at 161n.1.

judicial relief under 42 U.S.C. § 1983 in order to redress asserted deprivations of rights secured to him by the First and Fourteenth Amendments to the United States Constitution. R. 3. Named as defendants were Dr. Paul Blount, Head of the English Department at Georgia State University, Dr. Clyde Faulkner, Dean of the University's College of Arts and Sciences, and the College's former dean, Dr. Glenn G. Thomas. R. 3-4. In addition to alleging the violation of rights secured to him under the First Amendment, Dr. Ballard asserted violations of his rights under the "due process" and "equal protection" clauses of the Fourteenth Amendment. R. 8.

Following extensive discovery, including the depositions of all parties, the defendants (now Respondents) Blount, Faulkner and Thomas moved for summary judgment. R. 142-143. On December 12, 1983, the District Court entered an order and final judgment granting the motion for summary judgment and dismissing Petitioner's action. R. 347-361; *see Ballard v. Blount*, 581 F.Supp. 160 (N.D.Ga. 1983). On appeal, the United States Court of Appeals for the Eleventh Circuit placed the case on its "Non-Argument Calendar" under Fed. R. App. P. 34(a) and 11th Cir. R. 23 and affirmed without opinion. *See Ballard v. Blount*, 734 F.2d 1480 (11th Cir. 1984). Petitioner Ballard has filed a timely petition for a writ of certiorari under 28 U.S.C. § 1254.

(2) **Statement of Facts.**

The underlying facts of this case are substantially undisputed. Dr. Ballard, Plaintiff-Appellant below and now Petitioner, has been a member of the faculty at Georgia State University since 1969. Dep. Ballard, p. 6. His initial appointment was in the English Department of the Col-

lege of Arts and Sciences at the rank of Assistant Professor of English. Dr. Ballard's Ph.D. is in "linguistics" (a discipline which deals with the analysis of language, *e.g.*, development of sound and grammar systems in differing places). Dep. Ballard, pp. 4-5. The purpose of his employment was to help develop a linguistics program at Georgia State University—particularly as a discipline or area of concentration at the higher or graduate level. Dep. Ballard, pp. 6-7; Dep. Blount, p. 6; Dep. Thomas, pp. 51-52. Dr. Ballard was (and is) viewed by his administrative superiors, including Respondents, as a good teacher in the area of linguistics. Dep. Blount, p. 96; Dep. Thomas, pp. 23, 51. Accordingly, his performance as a teacher in this area was rewarded not only by periodic salary increases, but by promotion to the rank of Associate Professor of English and the award of "tenure" in 1973. Dep. Ballard, p. 6; Dep. Blount, pp. 7-8.

The underlying problem which ultimately led to the instant legal action was the relative lack of student interest and enrollment in linguistics. Former Dean Thomas testified that he became concerned about the enrollment problem in linguistics shortly after becoming Dean in 1973, the problem as he saw it being whether the College of Arts and Sciences and Georgia State University could continue to finance a program which had very limited student enrollment and showed no signs of growing. Dep. Thomas, pp. 21-22.

For a number of years thereafter, linguistics received "favored treatment" in the sense that many classes were taught rather than cancelled notwithstanding student enrollment lower than the minimum number ordinarily required for a class to proceed. Dep. Blount, pp. 94-95. This was done in an attempt (unsuccessful as it later

turned out) to build up the linguistics program by giving it as much support as possible. Dep. Blount, p. 95. Petitioner Ballard freely acknowledged the existence of enrollment problems in linguistics, although his perceptions differed from those of his administrative superiors (*i.e.*, Respondents) as to the severity of the problem. Dep. Ballard, p. 7.

Ultimately, in March, 1980, Dean Thomas made the decision to cancel the linguistics "program" (the term "program" has reference to linguistics as an area of concentration, particularly at the graduate level, not to be equated with an elimination of *all* course offerings in linguistics at Georgia State University). Dep. Thomas, pp. 27, 38-39; Dep. Ballard, pp. 14-15. Dean Thomas testified that the decision represented his professional judgment that in view of continued low enrollment and the fact that the linguistics program over a ten year period simply hadn't gotten off the ground, this was the appropriate resolution of the problem. Dep. Thomas, pp. 28, 38-40, 51. At the time (March, 1980), Dr. Ballard actually applauded the decision he now criticizes. He wrote Dean Thomas saying that the edict, while "stunning" for a time (even though not completely unanticipated), was "strikingly bold and innovative", clearing the air within the English Department "of concern that linguistics would in any way damage the Department's programs", and that he (Dr. Ballard) saw no punitive impact of the decision upon himself. *See* Exhibit "A" to Dep. of Ballard; *also* R. 23.

Even prior to the termination of the linguistics program, Dr. Blount, as Chairman of the Department of English, had advised Dr. Ballard that because of low student enrollment, he (Dr. Ballard) would have to do

more teaching in the area of English proper, giving Dr. Ballard a choice of courses from which to make a selection. Dep. Blount, p. 81; Dep. Ballard, pp. 9-10. Dr. Ballard chose English 112, a *freshman* course in English Composition. Dep. Ballard, pp. 9-10.

In contrast to Dr. Ballard's acknowledged effectiveness as a teacher of linguistics, his teaching efforts in freshman English Composition led to a larger than usual number of student complaints. Former Dean Thomas testified that while he did not recall any student complaints at all about Dr. Ballard's teaching in linguistics, complaints were frequent in connection with his English 112 classes. Dep. Thomas, p. 23. After Dean Thomas left and Dr. Faulkner was appointed initially "Acting Dean" (July, 1980), and then "Dean" (June, 1981), Dr. Faulkner similarly received student complaints relating to Dr. Ballard's English 112 classes. Dep. Faulkner, pp. 21-26. In Dean Faulkner's experience the proportion of complaining students was high. Dep. Faulkner, pp. 22-24.

Dr. Ballard's immediate administrative supervisor, Department of English Chairman Blount, experienced the same sort of student complaints and was also of the opinion that the number of student withdrawals from Dr. Ballard's freshman English Composition classes (English 112) was excessive, all of which tended to be reflected in Dr. Blount's performance evaluations of Dr. Ballard for merit salary increase purposes. *See* Dep. Blount, pp. 80-96; Exhibit "A" to Dep. of Dean Faulkner. Petitioner Ballard conceded that he was more qualified to teach linguistics than he was to teach English Composition—a course (*i.e.*, English 112) which he said he had been teaching more frequently since 1979. Dep. Ballard, pp. 7, 9.

Petitioner Ballard's percentage salary increases over

academic years 1977-78 through 1981-82 were somewhat less than the hypothetical "average" merit salary increases which could be calculated based upon the total funds made available by the Board of Regents for faculty salary increases and the total number of employed faculty members (virtually all of whom in fact received individual percentage increases either greater or smaller than the hypothetical "average"). Dr. Ballard's percentage increases in salary were, on the other hand, only marginally less than the hypothetical "averages" during the years in question. Thus at the end of the time period involved, academic year 1981-82, six of the eleven Associate Professors in the Department of English had higher salaries than Dr. Ballard, but four still had lower salaries than he did. *See* Exhibit "D" to Affidavit of Dr. Paul G. Blount; R. 221. In a total salary range for Associate Professors in the Department from $23,000 to $28,000, Dr. Ballard's salary of $24,500 during academic year 1981-1982 was in fact only $100 less *per year* than the salary of the "median" Associate Professor. *Ibid.*

Dr. Ballard first sought internal administrative relief. A faculty appeal committee was appointed to hear, and did hear, his salary grievance. The Committee found, *inter alia:* (1) that the attrition rate in Dr. Ballard's English 112 courses (freshman composition) was excessive, and (2) that Dr. Blount had based his estimate of Dr. Ballard's "merit" on what he (Dr. Blount) perceived to be Dr. Ballard's relatively poor performance in the teaching of English 112. The Committee concluded that there was no proof that Dr. Blount had been arbitrary, capricious, or unfairly discriminatory in his 1970-1980 recommendations respecting Dr. Ballard's salary increases, and recommended that Dr. Ballard's request for

larger pay raises than he had received, be denied. R. 227-230.

Aggrieved by this adverse judgment of the "Faculty Appeal Committee", Dr. Ballard initiated his legal action in the United States District Court. With respect to his First Amendment contentions (Dr. Ballard has not appealed the district court's adverse adjudications respecting his "due process" and "equal protection" claims), Dr. Ballard's Complaint described the nature of the "speech" involved as follows:

> "On many occasions since the Spring of 1976, Plaintiff has engaged in communicative and associative activity which is protected by the First Amendment to the United States Constitution. Specifically, Plaintiff has throughout this time period offered fair criticism and constructive suggestions regarding policy and academic matters within the Department of English, Georgia State University, and the College of Arts and Sciences, Georgia State University." R. 5.

This conceded focus of Dr. Ballard's "speech" on the internal academic affairs and operations of Georgia State University's Department of English (*e.g.*, how the Department was being run) is accurately described at pp. 2-6 of his Petition for a Writ of Certiorari and will be further discussed in the Argument portion of this Brief. As we shall see, "speech" of this nature cannot reasonably be viewed as being "protected" for purposes of constitutionalizing and obtaining federal judicial review of the size of Dr. Ballard's pay raises—to determine, for example, whether his 9.4% increase rather than 11.0% for academic year 1981-82 has somehow managed to violate the United States Constitution.

SUMMARY OF ARGUMENT

The notion that a college professor can "constitutionalize" and obtain federal judicial review of the size of his merit pay raise by the simple strategem of attributing any perceived inadequacy to the fact that he has spoken out in criticism of the internal academic policies or affairs of his college or department (here course content, teaching assignments, and departmental personnel needs for the teaching of freshman English Composition) is untenable under this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983). The district court's decision in this case was arrived at through precisely that analysis of the *content, form* and *context* of the speech called for in *Connick*. Its summary affirmance by the United States Court of Appeals for the Eleventh Circuit, was plainly correct and does not give rise to a conflict between the circuits as Petitioner mistakenly suggests. The petition for certiorari wholly fails to present any important federal issue which could reasonably be said to have survived *Connick* and merit plenary review of the size of Petitioner's merit salary increases by the Supreme Court of the United States.

Moreover, even if this Court had never decided *Connick*, or, were it for any reason to conclude that *Connick* should be reversed, limited or otherwise held inapplicable to Petitioner's situation, this Petition for certiorari should nonetheless be denied for each of three alternative reasons.

The first additional reason for denying the writ is that the decision below is also correct and properly affirmable under each of the two tests enunciated by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). As to the first test, the record

demonstrates that Petitioner failed to bear *plaintiff's* burden of showing that his speech was a motivating factor respecting the adverse personnel decisions. However, even had Petitioner passed this initial test, the record further shows that *Respondents* tendered evidence to establish the defense that the attacked personnel decisions would have been precisely the same had Petitioner done naught but praise how the English Department was being operated, and Petitioner failed to counter this evidence with any *evidence* (as opposed to naked charges) to the contrary.

Another non-*Connick* reason for denying the petition for certiorari is the absence of any actual injury in fact to Petitioner as a result of his speech. Under a merit approach to professorial salary increases there manifestly can be no legal entitlement to, or vested *property* interest in, a bigger pay raise. The record also negates the existence of any prior restraint or actual prevention of speech by Petitioner which might arguably be viewed as an infringement upon a legally cognizable *liberty* interest. This absence of any judicially ascertainable *injury in fact* suggests the appropriateness of a denial of certiorari for want of federal jurisdiction under the "case of controversy" limitations of Article III of our Constitution. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218-219 (1974). The jurisdictional limitations of Article III apply to First Amendment claims. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

Finally, Petitioner's grievances about the size of his salary increases were presented to and rejected by a faculty grievance committee. The faculty committee concluded that Petitioner's somewhat less than average salary in-

creases had been based upon his department chairman's perception of Petitioner's somewhat less than average performance in teaching freshman English Composition, and hadn't been unfairly discriminatory. Relitigation of these controlling conclusions of the faculty grievance committee in a United States district court would have been inappropriate under this Court's decision in *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 969 (1982). For this reason too the result reached by the courts below was correct and affirmable, with a grant of certiorari and plenary review by this Honorable Court unwarranted.

ARGUMENT

1. **The district court's decision in this case was arrived at through precisely that analysis of the content, form and context of Petitioner's "speech" which this Court called for in *Connick v. Myers*, 461 U.S. 138 (1983). Its conclusion that Petitioner's comments about the internal operating policies and academic affairs of his College and Department did not constitute "protected speech" for purposes of constitutionalizing and involving the federal judiciary in the size of Petitioner's pay raises was not only authorized, but was indeed compelled by *Connick*.**

   (a) **The decision below is plainly correct.**

Do we really want to trivialize the First Amendment to the point where federal courts are sitting as employee grievance committees, evaluating relative office size, thickness of carpeting, time at the water cooler, or, as here, whether a merit pay raise should have been 9.5% rather than 8.0% for academic year 1977-78? It would be difficult to find any living, breathing professor, on any college campus, who has not criticized the sort of internal college or departmental academic policies or affairs

pointed to by Petitioner in this case (*i.e.*, curricular or course content, teaching assignments, and departmental personnel needs). We think the district court did naught but recognize the plain facts of academic life when it said:

> "Indeed, if a faculty member need only point to some verbal criticism or altercation concerning his college, its curriculum, or how things are run in order to convert an adverse personnel decision into a federal action, then nearly every adverse personnel decision could be reviewable by a federal court under 42 U.S.C. § 1983." *Ballard v. Blount*, 581 F.Supp. 160, 163 (N.D.Ga. 1983).

We would indeed suggest that the only way in which this entirely accurate observation could be rendered even more accurate in the context of campus life in the real world would be through deletion of the word "nearly".

In *Connick v. Myers*, 461 U.S. 138, 143 (1983), this Court recognized that there must be a:

> "common-sense realization that government offices could not function if every employment decision became a constitutional matter."

The Court has long been cognizant of the danger of overly broad First Amendment construction swallowing the general rule that:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by [governmental] agencies." *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976) [bracketed word "governmental" substituted for "federal"].

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), for example, the Court held that even where the speech in issue clearly is *protected* speech under the First Amend-

ment, the rights of a governmental employee, unlike those of a private citizen, must be balanced against countervailing interests of the governmental employer, such as the possibly harmful impact of the *protected* speech upon the degree of harmony necessary to efficient agency operations or maintenance of discipline by administrative superiors. The factual setting of *Pickering* was one where the governmental employee's speech involved a local political controversy reported in the media and hence clearly was "protected".

Pickering did not, of course, reach the precise question presented to the Court in *Connick*, which is when and what speech is deemed to be "protected" for purposes of requiring the "balancing" of *Pickering*. On the other hand the *Pickering* Court did repeatedly refer to the teacher's right in terms of a right to speak out *as a citizen on matters of public concern*. *See, e.g.*, 391 U.S. at pp. 568, 570.

Thus when it came to defining what sort of criticism by a college or university faculty member would constitute speech which is "protected" and hence require the "balancing" of *Pickering*, a number of courts, even prior to *Connick*, held that those "dime a dozen" campus verbal disagreements over departmental policy, course content and like academic matters, did not involve speech about "matters of public concern", and hence were not "protected" for purposes of constitutionalizing and obtaining federal judicial review of, campus personnel decisions. In *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973), the Seventh Circuit rejected a faculty member's First Amendment contentions by saying:

> "His disputes with his superiors and colleagues about course content and counseling were not 'matters of public concern' and involved Clark as a teacher rather than as an interested citizen."

Similarly, in *Rowe v. Forrester*, 368 F.Supp. 1355, 1357 (M.D.Ala. 1974), it was said of such commonplace campus disagreements that:

> "This dispute did not involve Mr. Rowe's statements on matters of public concern ***, but rather resulted from disagreements about the regular operations and functions of the social science department and the proper relationship between the faculty and the administration within the college. Such speech does not trigger First Amendment protection."

Connick pragmatically recognizes that governmental offices cannot be expected to operate either efficiently or in an uninhibited manner if each and every personnel decision, no matter how picayune, is a fit matter for federal litigation under the First Amendment (with all attendant diversions of time, concern and expense). Drawing a line between that speech which is *protected* (requiring the trial court to engage in the *Pickering* "balancing") and speech which is *not protected* (judicial "balancing" *not* required), this Court said:

> "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are

alleged to be mistaken or unreasonable." *Connick, supra*, 461 U.S. at 146-147.

With respect to Petitioner's seeming contention that the internal affairs of a college or academic department of a public university are *ipso facto* matters of public concern, *Connick* tells us that:

> "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a round table for employee complaints *over internal office affairs*." *Connick, supra*, 461 U.S. at 149 (emphasis added).

Connick tells federal courts that in determining whether or not speech involves "matters of public concern" for purposes of constitutionalizing personnel decisions, they should consider the content, form and context of the speech. *Connick, supra*, 461 U.S. at p. 147-148. This is, of course, precisely what the district court did in this case, with painstaking detail. *See Ballard v. Blount*, 581 F.Supp. 160, 162-165 (N.D.Ga. 1983). We would respectfully suggest that under *Connick* the district court could not have rationally reached any other decision than that which it did reach—that the speech, as described by Petitioner himself, was uttered "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest", *see Connick, supra*, 461 U.S. at 147. Indeed the *Connick* rationale would if anything appear to apply even more strongly here than it did in *Connick*. In contrast to the termination of employ-

ment involved in *Connick* we have here such relatively unimportant concerns as the size of some of the annual salary increases Petitioner has received.

The district court's decision in this case was, as we see it, not merely authorized, but was indeed compelled by the standards enunciated by this Court in *Connick*. The summary affirmance by the Court of Appeals for the Eleventh Circuit was plainly correct and is not deserving of plenary review by this Honorable Court.

(b) **Petitioner's suggestion that the decision below involves a conflict between the circuits on the proper application of *Connick* is inaccurate.**

Petitioner's contention that the opinion below results in a conflict between the circuits on the proper application of *Connick* is incorrect. Even the most superficial reading of *McGee v. South Pemiscot School District*, 712 F.2d 339 (8th Cir. 1983), the case upon which Petitioner chiefly relies to show inter-circuit conflict, reflects an entirely dissimilar factual situation. It is true that the *content* of the speech in *McGee*, *i.e.*, whether or not to continue a junior high school track program, might well appear, if viewed in a vacuum, to involve the same sort of internal academic disputation here held not to be a matter of public concern. But as *Connick* points out, the "context" as well as the "content" of speech must be considered. In *McGee* the speech was not merely the sort of routine, in-school disagreement heard at any faculty meeting. The matter had become the subject of *public* controversy, had been reported in the media, and was indeed an issue in a local election campaign. Moreover, the "form" of the speech (also relevant under *Connick*) was a letter to the editor of a local newspaper in which the plaintiff teacher was taking exception to certain prior newspaper articles concerning his reported views on the matter. As the Court

of Appeals for the Eighth Circuit pointed out in distinguishing *Connick:*

> "We have before us a case where the plaintiff wrote a letter to a newspaper about an issue that *had already been publicly aired by the defendants.*" 712 F.2d at 342-343n.4 (emphasis added).

The other cases cited by Petitioner are similarly distinguishable in terms of the *content, form* and *context* of the speech involved. *Gonzalez v. Benavides*, 712 F.2d 142 (5th Cir. 1983), as *McGee*, involved a controversy which was in fact "public", with public reprimands and denials having been disseminated through the local media. 712 at 144-145. *Czurlanis v. Albanese*, 721 F.2d 98 (3rd Cir. 1983), involved an employee speaking out at a public meeting of a county board, criticizing false reporting, inefficiency and improper expenditures of county funds by the county agency for which he worked. Entirely consistent with the "content, form and context" standards of *Connick* the Court of Appeals concluded that this speech *at a public meeting* of the County Board was made as a concerned citizen and taxpayer not as an aggrieved employee. 721 F.2d at 104. Finally, in *Bowman v. Pulaski County Special School District*, 723 F.2d 640, 644 (8th Cir. 1983), the Court of Appeals expressly noted that the speech in question arose in the context of *public debate* over the alleged excessive use of corporal punishment rather than in the context of an internal office grievance.

Actually, where the facts have at all resembled those involved in the case at bar, the decisions of the lower courts would appear to have uniformly reached the same results we see here. *See, e.g., Jordan v. Board of Regents, University System of Georgia*, 583 F.Supp. 23, 28 (S.D.Ga. 1983), *aff'd.*, 727 F.2d 1114 (11th Cir. 1984); *Cook v. Ashmore*, 579 F.Supp. 78, 83-84 (N.D.Ga. 1984); *Landrum v.*

Eastern Kentucky University, 578 F.Supp. 241, 245-247 (E.D.Ky. 1984). Indeed one federal district court would appear to have reached a like conclusion in a virtually indistinguishable factual situation. In *Mahaffey v. Kansas Board of Regents*, 562 F.Supp. 887 (D.Kan. 1983), a college professor similarly attempted to obtain federal judicial review of his merit salary increases, committee assignments, and size of his office under the First Amendment. The particular speech pointed to by Professor Mahaffey, much like that in the present case, consisted of his criticism of certain administrative decisions within his academic department as well as of a College administrative reorganization which resulted in his specialty, park management, being placed within the Department of Forestry. Applying *Connick*, the district court concluded that speech relating to internal operating policies and affairs of the college was a matter of individual, not public concern, and that the faculty member could not bootstrap his individual grievance into a matter of public concern by invoking a supposed popular interest in all aspects of the way public institutions are run. 562 F.Supp. at 890.

In summary, there is no conflict between the circuits as to the application of *Connick* in the sort of factual situation we have in this case.

2. Even were the Court disposed to overrule or limit its decision in *Connick*, or, were it for any other reason to conclude that *Connick* was not controlling as to Dr. Ballard's case, the petition for certiorari should be denied in that the judgment of the district court, affirmed by the Court of Appeals, was in fact correct and affirmable on each of three alternative grounds.

It has long been settled that if the ultimate decision and judgment of a trial court is correct for any reason appearing in the record, it is affirmable on appeal even though

the trial court may have predicated its correct result on erroneous grounds. *See, e.g., J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Morris v. Travisono*, 707 F.2d 28, 32 (1st Cir. 1983); *Bickford v. International Speedway Corporation*, 654 F.2d 1028, 1031 (5th Cir. Unit B, 1981). In this case Respondents (defendants below) were plainly entitled to the entry of judgment in their favor on each of three alternative grounds wholly without regard to *Connick*. We therefore submit that even were the Court disposed to reconsider *Connick* (and we hope this isn't the case), this particular petition for a writ of certiorari doesn't present an appropriate vehicle for reconsideration.

(a) **Facts of record show that should *Connick* be disregarded and Petitioner's speech held to be protected, the judgment below would still be correct and affirmable under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).**

Assuming *arguendo* that *Connick* were for any reason to be held inapplicable to Petitioner Ballard's situation, with his speech on internal "academic policy"[2] held protected under the First Amendment for purposes of constitutionalizing even such relatively less important personnel decisions as the size of one's pay raise,[3] the entry of judgment in favor of Respondents was nonetheless

---

[2] *See* Petition for a Writ of Certiorari, p. i.

[3] Implicit in *Connick* is recognition of the fact that perhaps the first step in answering the question of whether or not particular speech is "protected" is to ask yet another question: "Protected for what purpose?" (*i.e.*, the significance of context as well as content). Bad grammar and expressions of irrational thought may well be

correct and properly affirmable under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Mt. Healthy* requires a plaintiff who attacks an adverse personnel decision by pointing to speech which he contends is protected by the First Amendment to meet two critical tests to prevail. 429 U.S. at 287; *Leonard v. City of Columbus*, 705 F.2d 1299, 1303-1306 (11th Cir. 1983).

The first test, again assuming the protected nature of the speech, is whether the *plaintiff* has carried his burden of proving that the speech was *in fact* a motivating factor concerning the personnel decision about which he complains. The second test is whether the *defendant* has carried his burden of proving, as an affirmative defense, that the complained of personnel decisions would have been the same had the constitutionally protected speech never occurred. *Ibid.* Based upon the facts of record in this case, each of the two tests would call for affirmance of the district court's entry of judgment in favor of the Respondents.

Looking at the first test (whether Petitioner's speech had anything to do with the size of his salary increases, curtailment of the linguistics program, or any of the less significant personnel matters he has mentioned), Dr. Ballard wholly failed to come forth with any *factual* evidence (as distinguished from naked allegations) of any linkage between the speech and personnel decisions to which he has pointed. To the contrary, such evidence as

---

protected by the First Amendment for purposes of the offender's imprisonment, but at the same time *unprotected* for purposes of adverse personnal actions in a University's English or Philosophy departments.

Dr. Ballard did present was more or less supportive of Respondents' testimony that his slightly less than average merit salary increases were based upon his department chairman's perception of his somewhat less than average teaching performance in *English*, and in no way affected by Dr. Ballard's perfectly normal faculty criticism as to how the English Department and College of Arts and Sciences were being run. Petitioner Ballard conceded, for example, that he was less qualified to teach English Composition than the area of his particular expertise, linguistics. Dep. Ballard, pp. 7, 9. He conceded that he did not believe that the faculty committee which had looked into the matter and upheld his department chairman's pay raise determinations, had been motivated by a desire to retaliate against him because of his criticism of certain aspects of departmental policy. Dep. Ballard, p. 48. Moreover, Petitioner seemingly accepted the truthfulness of Respondents' testimony that they viewed his criticisms as having been well within the established norm of an academic atmosphere which in fact encouraged constructive criticism of both academic policy and the decision of academic policymakers. At page 2 of his Petition to this Honorable Court for a writ of certiorari, Dr. Ballard states:

> "The express policy of the Georgia State University English Department, as articulated by the Defendant Blount, was to encourage the faculty to offer fair criticism and constructive suggestions regarding academic policy so as to develop a broad base upon which to establish and implement such policy."

The record discloses that Dr. Ballard failed to come forth with any evidence which could even conceivably have supported a judicial finding that the reasons stated by Respondents for the complained of personnel decisions,

corroborated by both documentary and testimonial evidence, were pretextual.

Looking to the second test, Dr. Blount testified positively that faculty criticism of how the English Department and College of Arts and Sciences were being run was quite normal, and that he in fact did not recall Petitioner as being any more critical than faculty members generally. He testified positively that had Dr. Ballard done naught but praise everything that had ever been done in the English Department, the personnel decisions in question would have been precisely the same. Dep. Blount, pp. 104-105. Petitioner Ballard again introduced no evidence whatsoever to refute this positive testimony, testimony corroborated by the findings of the faculty grievance committee as well as supported by performance reports and student complaints concerning Dr. Ballard's teaching of freshman English Composition. Even if the speech in question were fully "protected", in other words, *Mt. Healthy* dictates that since the attacked personnel decisions would have been the same with or without the "speech" in question, the ultimate judgment in favor of the Respondents was plainly correct and properly affirmable on this ground as well.

(b) **Facts of record demonstrate an absence of federal jurisdiction under the "case or controversy" limitations of Article III of our Constitution—namely a want of any judicially ascertainable, "injury in fact" to Petitioner.**

Since the First Amendment applies to the States and State agencies solely by virtue of the "due process" clause of the Fourteenth Amendment, *e.g.*, *Hughes v. Superior Court of California*, 339 U.S. 460, 462 (1950); *Gitlow v. New York*, 268 U.S. 652, 666 (1925), it would

seem to follow that before a plaintiff can make out a First Amendment case against a *State* agency or official on the basis of a personnel decision, the plaintiff must show that he has been deprived, in some tangible way, of either a "liberty" or "property" interest protected by the "due process" clause—in other words that he has suffered some actual injury in fact, not theory. *See, Paul v. Davis*, 424 U.S. 693, 701-712 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 569-575 (1972). This requirement of actual injury to a property or liberty interest would appear to be but an application in the "due process" sense of the Article III requisite of some tangible and non-theoretical "injury" to support federal jurisdiction. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218-219 (1974).

That the jurisdictional limitations of Article III apply to actions predicated on the First Amendment was recognized by the Court in *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). *See also, e.g., National Student Association v. Hershey*, 412 F.2d 1103, 1113-14 (D.C. Cir. 1969). In the case at bar Petitioner Ballard has in fact received pay raises. His complaint is that the increases haven't been big enough. But under a merit approach to salary increases there obviously isn't any legal entitlement to an increase of any particular size. The fact that Dr. Ballard's pay raises have not been as large as he would have liked does not give rise to a *property* interest in a bigger salary. Similarly, there is no evidence to show that he has ever been prevented from saying anything at all that he wanted to say. There is no "prior restraint". No *liberty* interest is involved. At best Petitioner would be able to argue the existence of a subjective "chill". This isn't an adequate substitute for the Article III requisite of injury *in fact.*

See Laird v. Tatum, supra.

(c) **Relitigation of the controlling evidentiary conclusions of the faculty grievance committee would be inappropriate under *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966 (1982).**

As already noted, Petitioner had a hearing before a faculty grievance committee concerning his salary complaint and the faculty committee found against him. R. 227-230. The committee expressly found that the attrition rates in Dr. Ballard's English 112 courses seemed to be excessive, and found that Petitioner's department chairman, Dr. Blount, in fact based his evaluation of Dr. Ballard's performance for salary increase purposes upon his perception of poor performance in the teaching of English 112 as evidenced by a high drop-out rate and large number of student complaints. The Committee noted that Dr. Ballard's assignments in English (as opposed to his area of expertise, *i.e.*, "linguistics") had resulted from insufficient enrollment in linguistics. The Committee concluded that there was no proof that Dr. Blount had been "arbitrary, capricious or unfairly discriminatory in his 1977-80 recommendations for Dr. Ballard's salary increases, teaching assignments, or released time". It recommended that Dr. Ballard's salary requests be denied, pointing out that Dr. Ballard had himself claimed no more than "average" merit, and that his current salary in fact placed him close to the average for his rank within his department. Dr. Ballard expressly disclaimed any prejudice against him on the part of the grievance committee. Dep. Ballard, p. 48.

In *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 969 (1982), this Court said that:

> "§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising out of school disciplinary proceedings or the proper construction of school regulations."

Under the authority of *Board of Education of Rogers, Arkansas*, Respondents respectfully suggest that it would have been inappropriate for the district court to have relitigated these controlling evidentiary conclusions of the faculty grievance committee, and that for this reason too the entry of judgment in favor of Respondents was correct, properly affirmable, and is unworthy of plenary review by the Supreme Court of the United States.

CONCLUSION

For all of the reasons stated Respondents submit that the judgment below was plainly correct, that there is in fact no conflict between the circuits as contended by Petitioner, and that no reason exists for this Honorable Court's grant of a writ of certiorari and plenary review of the question of whether or not Petitioner's pay raises have been large enough.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

JIM O. LLEWELLYN
Senior Assistant Attorney General

ALFRED L. EVANS, JR.
Senior Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Telephone: (404) 656-3389